No. SC94745

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JERRI SMILEY,

Respondent.

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Calvin R. Holden, Judge

APPELLANT'S BRIEF

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ISSUE PRESENTED

Missouri's armed-criminal-action statute (section 571.015, RSMo 2000) imposes a mandatory minimum sentence of three years. In addition, any person convicted under this statute is ineligible for parole, probation, conditional release, or a suspended imposition or execution of sentence for "three calendar years." The circuit court declared that this statutory provision violated Missouri's Constitution as applied to juvenile offenders because it required incarceration and did not give the sentencing court discretion to suspend a sentence after considering the juvenile offender's individual circumstances. Do the due-process and cruel-and-unusual-punishment clauses of the Missouri Constitution mandate individualized sentencing of all juvenile offenders and preclude any statutory scheme requiring incarceration for juvenile offenders for any amount of time and for any crime?

JURISDICTIONAL STATEMENT

The State appeals from a Greene County Circuit Court judgment declaring part of the penalty provision of the armed-criminal-action (ACA) statute (section 571.015.1, RSMo 2000) unconstitutional as applied to juvenile offenders. Because the circuit court's judgment effectively dismissed the ACA charge pending against Respondent (Defendant), and because this case involves the validity of a state statute, this Court has jurisdiction over the State's appeal.

The penalty provision of section 571.015.1 states that ACA "shall be punished by imprisonment…for a term of not less than three years" and that this sentence "shall be in addition to any punishment" for the underlying offense. The final sentence requires any person convicted of ACA to serve at least three years in prison: "No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years." [1]

[1] Subsection 2 imposes a five-year-minimum sentence upon a second ACA conviction with five years to be served in prison. Subsection 3 imposes a 10-year-minimum sentence upon a third ACA conviction with 10 years to be served in prison.

The circuit court ruled that this final sentence, as applied to juvenile offenders, violated article I, sections 10 (due-process clause) and 21 (cruel-and-unusual-punishments clause) of the Missouri Constitution because it mandated incarceration for juvenile offenders found guilty of ACA.[2] (L.F. 125–26). But the court did not dismiss the armed-criminal-action charge (Count II) pending against Defendant; it instead severed the final sentence of subsection 1 from the remainder of the statute and held that the remaining penalty provision, including the three-year minimum sentence, could be applied to juvenile offenders as long as the sentence of imprisonment could be suspended. (L.F. 126).

This Court has jurisdiction over this appeal because it involves the circuit court's declaration that part of the penalty provision contained in subsection 1 of the ACA statute is unconstitutional. The circuit court's ruling effectively dismissed the ACA charge since its judgment leaves no valid penalty for juvenile offenders found guilty of ACA, notwithstanding the court's severance of the offending language. As explained below, the court's ruling rendered the entire ACA statute void as applied to juvenile offenders.

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[2] The circuit court did not base its judgment on any federal constitutional grounds.

A "criminal statute that fails to provide a valid punishment is void." *State v. Hart*, 404 S.W.3d 232, 238 (Mo. banc 2013). Although the circuit court's judgment purportedly severs the unconstitutional sentence from the remainder of the penalty provision, the court had no authority to effectively rewrite the statute in this manner. The severance doctrine cannot be applied to create a punishment not authorized by the plain language of the criminal statute. *Id.* at 244–45 (noting that the "severance doctrine never has been used, in this Court or any other, to justify replacing a statute drafted by the legislature with one of the judiciary's own invention"). The armed-criminal-action statute plainly does not authorize a court to impose a suspended sentence; it expressly mandates that any person convicted of that offense serve a minimum of three years in prison for a first offense. *See Johnson v. Missouri Dep't of Corr.*, 166 S.W.3d 110, 112 (Mo. App. W.D. 2005) ("The armed criminal action statute includes its own minimum terms, requiring convicted persons to serve at least three years before reaching eligibility for parole or early release from prison."). *See also State v. Evans*, 45 S.W.3d 452, 459 (Mo. App. E.D. 2014) (holding that the passage of the armed criminal action statute "indicates the legislature's intent to impose greater punishment on those individuals who choose to use an item or weapon to commit a crime than those who do not").

The circuit court was not authorized to apply the severance doctrine to permit a suspended sentence for juvenile offenders when the express language of the statute does not permit such a sentence.

The circuit court's judgment thus rendered the entire penalty provision unconstitutional as applied to juvenile offenders. Since no valid punishment for ACA committed by a juvenile exists under the circuit court's judgment, its decision effectively dismissed that charge as applied to Defendant. Since this ruling constitutes a final judgment as to that charge, this Court thus has jurisdiction over the State's appeal in this matter. *See* § 547.200.2, RSMo 2000; Rule 30.01(a); *State v. Honeycutt*, 421 S.W.3d 410, 414 n.4 (Mo. banc 2013) (holding that this Court had jurisdiction over the State's appeal from the circuit court's dismissal, on constitutional grounds, of one count in a three-count indictment when that ruling "had the practical effect of terminating the litigation and constituted a final and appealable judgment"); *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004) (holding that the State had the right to appeal a circuit court judgment declaring two statutory offenses unconstitutional that resulted in "an outright dismissal"of charges); *State v. Bracken*, 333 S.W.3d 48 (Mo. App. E.D. 2010) (holding that the Court of Appeals had jurisdiction over an appeal from a judgment of conviction on 2 counts of a 16-count indictment even though a mistrial had been declared on

the remaining 14 counts on which the jury had deadlocked); *State v. March*, 130 S.W.3d 746, 747–48 (Mo. App. E.D. 2004) (holding that the dismissal of one count in a multi-count indictment constituted "a final, appealable judgment" since it precluded any further prosecution on that charge). *See also State v. Burns*, 994 S.W.2d 941, 942 (Mo. banc 1999) (noting that "in a criminal case, a judgment is final when the trial court enters an order of dismissal or discharge of the defendant prior to trial which has the *effect* of foreclosing any further prosecution of the defendant on a *particular* charge") (emphasis added).[3]

Finally, since this case involves the validity of a state statute, this Court has exclusive appellate jurisdiction. MO. CONST. art. V, § 3.

[3] *But see State v. Stegman*, 90 Mo. 486, 2 S.W. 798, 799 (1887) (holding that the State's appeal was premature when the trial court dismissed only two counts of a three-count indictment); *State v. Storer*, 324 S.W.3d 765 (Mo. App. S.D. 2010) (holding there was no "final judgment" and thus no jurisdiction over the State's appeal from the circuit court's dismissal on double-jeopardy grounds of only four counts in a six-count information).

STATEMENT OF FACTS

Respondent (Defendant), who was born in September 1996, was 16 years and 8 months old (and pregnant) when she was arrested by police for allegedly stabbing another woman in the back. (L.F. 12–14). The probable-cause statement reported that witnesses told police that after a fight between Defendant and another female had broken up, Defendant, who had been walking toward a car, suddenly ran around from the driver's side of the car and stabbed the female she had been fighting with in the upper part of the back. (L.F. 12–14). Defendant's boyfriend took the knife away from her and put it in his pocket. (L.F. 12–14).

Defendant, her boyfriend, and another person then left the area in a vehicle that was later stopped by police.[4] (L.F. 12–14). When the officer asked the car's occupants who had the knife, Defendant's boyfriend said that he did. (L.F. 13). Defendant then volunteered that she was the one who had stabbed the other female. (L.F. 13). Defendant was arrested, and her skirt, which was

[4] A police dispatch advised that a "suspect" had called 911 to report the stabbing and was en route to the police station. (L.F. 13). Defendant's boyfriend later reported to police that he was driving to the police station when the car was stopped. (L.F. 14).

apparently stained with blood, and the knife, which also had blood stains on it, was collected as evidence. (L.F. 13). An officer reported that he heard Defendant admit to medical personnel, who were treating her for possible complications related to her pregnancy, that she was the one who had committed the stabbing. (L.F. 13).

The Greene County juvenile officer later filed a petition in the circuit court's juvenile division alleging that Defendant had committed acts that, if committed by an adult, would constitute first-degree assault, armed criminal action, and second-degree assault.[5] About a month after the stabbing occurred, the juvenile officer filed a motion to dismiss the petition and to allow prosecution of Defendant under the general law. (L.F. 15–16). After a

[5] The petition alleged that Defendant had "deliberately, knowingly caused serious physical injury or attempted to cause serious physical injury to [the victim] by stabbing [the victim] in the back near the shoulder blade with a knife, which caused [the victim] to need seven surgical staples." (L.F. 15). It also alleged that Defendant "deliberately and knowingly attempted to cause serious physical injury to B.L. [her boyfriend's cousin] by "kicking B.L. multiple times in the stomach and ribs and by…hitting…B.L. on the back and head multiple times." (L.F. 16).

statutorily mandated juvenile-certification hearing was held,[6] during which Defendant was represented by counsel, the juvenile-division judge entered findings and a judgment dismissing the petition and permitting Defendant to be prosecuted under the general law. (L.F. 15–17). In its judgment, the court considered the factors required under section 211.071.6 and determined that Defendant was not a "proper subject to be dealt with under" the juvenile code. (L.F. 16–17).

The State thereafter filed an information charging Defendant with the felonies of first-degree assault (Count I) and armed criminal action (Count II). (L.F. 20–21). Defendant later filed a motion to declare the ACA statute unconstitutional under both the United States and Missouri constitutions as applied to juveniles because it "mandated prison time" and did not permit a judge to consider a juvenile offender's "youth, immaturity, and other relevant factors when imposing a sentence." (L.F. 22). In her motion, Defendant argued that any statutorily mandated prison sentence imposed on a juvenile offender violated the cruel-and-unusual-punishment clauses in both the state

[6] Section 211.071.1, RSMo Cum. Supp. 2013, requires that a hearing be held if the juvenile petition alleges particular offenses, including first-degree assault.

and federal constitutions. (L.F. 22–48). The State filed a response in opposition to the motion, and Defendant later supplemented its original motion with additional arguments. (L.F. 49–86).

The circuit court heard arguments on the motion, and less than a week before Defendant's bench trial was set to begin,[7] the court entered a judgment declaring that the ACA statute was unconstitutional as applied to juveniles in violation of article I, sections 10 (due-process clause) and 21 (cruel-and-unusual-punishment clause) because it imposed a three-year mandatory minimum prison sentence requiring incarceration.[8] (L.F. 89, 125–26). Although the circuit court did not base its decision on the federal constitution, its judgment relied almost exclusively on the United States Supreme Court's Eighth Amendment jurisprudence related to juvenile offenders. (L.F. 89–98). The circuit court based its decision not on the specific holdings in those federal cases—all of which dealt with the imposition of

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[7] Defendant had previously waived her right to a jury trial. (Tr. 2–6).

[8] The circuit court's judgment does not elaborate on its finding that the ACA statute violated Missouri's due-process clause other than to say "due process requires that the sentencing judge…have that flexibility to keep juveniles out of prison." (L.F. 118).

capital punishment or life-without-parole sentences on juvenile offenders—but on "the *rationale* behind those decisions." (L.F. 98–99) (emphasis in original).

The circuit court determined that under Missouri's Constitution "the mitigating factors the United States Supreme Court held must be considered when a certified juvenile faces life without parole must also be considered when a juvenile faces *any* amount of prison time for *any* offense. (L.F. 102) (emphasis added). The court found that if consideration of the juvenile defendant's youth and background leads a court to believe that the appropriate disposition is a suspended prison sentence, then it "must be allowed" to impose a suspended sentence. In the court's words, "the [c]ourt must be able to go where the 'juvenile factors' lead it." (L.F. 103).

Although the court's judgment acknowledged that the General Assembly "has determined that adults who use a weapon in the commission of a felony are not worthy of probation until they spend three years in prison," a juvenile "is less culpable than an adult." (L.F. 104). The court struck down the ACA statute because it does not give courts "the flexibility…to keep juveniles out of prison." (L.F. 105). In its judgment, the court determined that "[r]equiring a juvenile to be sent to prison…in cases where consideration of all the relevant factors demonstrates prison is unjust and inappropriate, violates a

juvenile's right to due process and to be free from cruel and unusual punishment" under Missouri's Constitution. (L.F. 105–06).

Instead of dismissing the ACA charge (Count II), the circuit court's judgment severed the mandatory-incarceration provision from the remainder of the statute's penalty provision, which it held could be constitutionally applied to juveniles even though it required a mandatory minimum sentence of three years. (L.F. 126).

The State then filed its notice of appeal in circuit court after the circuit court entered its judgment declaring the penalty provision of the ACA statute unconstitutional as applied to juveniles. (L.F. 10).

POINT RELIED ON

The circuit court erred in declaring that the penalty provision of the ACA statute (section 571.015, RSMo 2000), which imposes a mandatory minimum sentence of three years that must be served without "parole, probation, conditional release or suspended imposition or execution of sentence," unconstitutional as applied to juvenile offenders because this provision does not violate the Missouri Constitution's due-process (article I, section 10) or cruel-and-unusual-punishment (article I, section 21) clauses in that the imposition of a statutorily mandated three-year term of incarceration for a juvenile offender who commits a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon" is not barbarous or excessive.

State v. Hart, 404 S.W.3d 232 (Mo. banc 2013);

State v. Denzmore, 436 S.W.3d 635 (Mo. App. E.D. 2014);

Burnett v. State, 311 S.W.3d 810 (Mo. App. E.D. 2009);

State v. Taylor G., 110 A.3d 338 (Conn. 2015).

ARGUMENT

The circuit court erred in declaring that the penalty provision of the ACA statute (section 571.015, RSMo 2000), which imposes a mandatory minimum sentence of three years that must be served without "parole, probation, conditional release or suspended imposition or execution of sentence," unconstitutional as applied to juvenile offenders because this provision does not violate the Missouri Constitution's due-process (article I, section 10) or cruel-and-unusual-punishment (article I, section 21) clauses in that the imposition of a statutorily mandated three-year term of incarceration for a juvenile offender who commits a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon" is not barbarous or excessive.

A. Standard of review.

"The constitutionality of a statute is a question of law, the review of which is de novo." *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 737 (Mo. banc 2007). "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009) (quoting

Board of Educ. of City of St. Louis v. State, 47 S.W.3d 366, 368-69 (Mo. banc 2001)). "This Court will 'resolve all doubt in favor of the act's validity' and may 'make every reasonable intendment to sustain the constitutionality of the statute.'" *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007) (quoting *Westin Crown Plaza Hotel v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984)). "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id.* "The party challenging the validity of the statute has the burden of proving the statute unconstitutional." *Id.*

B. The content of the ACA statute and related constitutional provisions at issue in this case.

In Missouri, "any person who commits any felony…by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action [ACA]…." § 571.015.1, RSMo 2000. The ACA statute provides for a mandatory minimum sentence of "not less than three years," which must be served without "parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years." *Id.*

The Missouri Constitution prohibits the infliction of cruel and unusual punishment: "That excessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punishment inflicted." MO. CONST. art. I, § 21. The right to due process is also embodied in Missouri's Constitution: "That no person shall be deprived of life, liberty or property without due process of law." MO. CONST. art. I, § 10.

Although the circuit court did not rest its decision on federal constitutional grounds, its judgment relies almost exclusively on United States Supreme Court cases interpreting the Eighth Amendment as applied to juveniles. The Eighth Amendment is worded almost identically to article I, section 21 found in Missouri's Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. "The Eighth Amendment [is] applicable to the States through the Due Process Clause of the Fourteenth Amendment." *Baze v. Rees*, 553 U.S. 35, 47 (2008) (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)).

When considering whether a punishment violates the Missouri Constitution's cruel-and-unusual-punishment clause, this Court "presume[s] [the punishment's] validity, and those who seek to invalidate it bear a heavy burden of demonstrating that it is either *barbarous* or *excessive*." *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 916 (Mo. banc 1980) (emphasis added), *vacated on other grounds by Bullington v. Missouri*, 451 U.S. 430 (1981). In

State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982),[9] this Court noted that in *Mason* it had "refused to extend the reach of [Missouri's cruel-and-unusual-punishment clause]…and arrogate to [itself] a policy decision properly within the legislative province." *Id.* at 612. In rejecting a constitutional challenge to one of Missouri's capital-punishment statutes, this Court in *Newlon* "refused to stretch the meaning of Art. I, § 10 [Missouri's due process clause] to invalidate the death penalty, beyond the limits of the due process requirements of the Fourteenth Amendment to the U.S. Constitution. *Id.* Similarly, a person contending that a criminal punishment violates the Eighth Amendment bears the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

C. The United States Supreme Court's Eighth Amendment cases have struck down only those statutes that impose on juveniles the harshest punishments (death and life without parole).

Since the circuit court's judgment involves a vast extension of United States Supreme Court Eighth Amendment jurisprudence to invalidate, on

[9] Overruled on other grounds by *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997).

state constitutional grounds, the penalty provision of the ACA statute, a review of those cases is necessary to expose the overreach encompassed by the circuit court's judgment.

Modern application of the Eighth Amendment specifically to juveniles charged with criminal offenses began in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in which a plurality of the Court determined that the Eighth Amendment prohibited the imposition of capital punishment on a person who committed murder before reaching the age of 16 under a capital-punishment statute that specified no minimum age. A year later, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court held that the Eighth Amendment did not bar capital punishment for those who committed murder when they were 16 years old or older.

But 14 years later, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court imposed a categorical ban on capital punishment for all juvenile offenders, which the Court defined as any person under 18 years old. *Id.* at 568, 570–71, 574, 578. In reaching this holding, the Court noted that "[b]ecause the death penalty is the *most severe* punishment, the Eighth Amendment applies to it with special force." *Id.* (emphasis added).

Five years later, in *Graham v. Florida*, 560 U.S. 48 (2010), the Court held "that for a juvenile offender who did not commit homicide the Eighth

Amendment forbids the sentence of life without parole." *Id.* at 74. But the Court clearly noted that "[t]he instant case concerns only those juvenile offenders sentenced to *life without parole* solely for a nonhomicide offense." *Id.* at 63. In reaching this holding the Court stated that "[a]lthough an offense like robbery or rape is 'a serious crime deserving serious punishment,' those crimes differ from homicide in a moral sense." *Id.* at 69 (citation omitted) (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). The Court qualified its holding by stressing that a State need not release the nonhomicide offender during his or her "natural life": "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." *Id.*

Two years after *Graham*, the Court held in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that the Eighth Amendment does not permit a sentencing scheme that mandates the imposition of a life-without-parole sentence on a juvenile offender. *Id.* at 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). But the Court in *Miller* expressly

held that a life-without-parole sentence may constitutionally be imposed on a juvenile who commits murder, just not under a sentencing scheme that mandates its imposition. *See Miller*, 132 S. Ct. at 2465 ("To be sure, *Graham's* flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder."); *Id.* at 2469 (noting that the Court's holding did "not foreclose a sentencer's ability" to impose a life-without-parole sentence in homicide cases); *Id.* at 2471 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime…."). *See also Hart*, 404 S.W.3d at 237–38 ("*Miller* holds that…a [life without-parole] sentence is constitutionally permissible as long as the sentencer determines it is just and appropriate in light of the defendant's age, maturity, and the other factors discussed in *Miller*.").

The constitutional problem in *Miller* involved sentencing schemes that mandated life-without-parole sentences, not the sentence itself. The Court stressed that its holding "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471. The constitutional requirement created in *Miller* applies only when consideration is being given to sentencing the juvenile who commits murder to life without parole, the harshest penalty constitutionally available to impose. *Id.* at 2469 (holding

that a sentencing scheme that mandates life in prison without parole is unconstitutional because it makes the offender's youth "irrelevant to imposition of that *harshest* prison sentence") (emphasis added); *Id.* at 2475 (explaining that "*Graham*, *Roper*, and our individualize sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the *harshest possible penalty*"). *See also Hart*, 404 S.W.3d at 238.

D. The circuit court's judgment involves an unwarranted extension of the Supreme Court's Eighth Amendment jurisprudence.

The circuit court read the holdings in *Roper*, *Graham*, and *Miller* much too broadly, especially since the validity of an act of the General Assembly is at stake. These holdings do not establish, or even suggest, a constitutional rule mandating individualized sentencing for all juvenile offenders and prohibiting statutory schemes that provide for mandatory minimum sentences of incarceration as applied to juveniles. Instead, these decisions are consistent with and mirror the Court's Eighth Amendment jurisprudence involving non-juvenile offenders.

Before *Roper*, the Supreme Court had held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the death penalty could not be constitutionally imposed on a mentally retarded offender since those offenders have diminished culpability.

See Roper, 543 U.S. at 565. *Roper*, in turn, relied on the diminished-culpability principle employed in *Atkins* in reaching its holding that the Eighth Amendment prohibited the imposition of capital punishment on juvenile offenders. *Id.* at 571. *See also Kennedy v. Louisiana*, 554 U.S. 407, 413, 420 (2008) (noting that the Court had "held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime").

After *Roper*, the harshest punishment that could constitutionally be imposed on a juvenile who had committed murder was life imprisonment without parole. The Supreme Court has repeatedly held that capital punishment cannot be imposed for a nonhomicide offense: "[T]he death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim." *Kennedy v. Louisiana*, 554 U.S. at 421 (child rape); *see also Enmund v. Florida*, 458 U.S. at 797 (felony murder when the defendant did not intend to kill); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (rape of an adult woman). The Court's later decision in *Graham*, in which it held that a juvenile could not be sentenced to life without parole—the harshest sentence available for that class of offenders—for a nonhomicide offense was consistent with these prior

holdings. In fact, the Court in *Graham* relied on these cases in reaching its holding. *Graham*, 500 U.S. at 60–61.

Before *Miller*, the Supreme Court had held that statutory schemes mandating a sentence of death violated the Eighth Amendment. *See Woodson v. North Carolina*, 428 U.S. 280, 287, n.6, 301–305 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325 (1976). Moreover, the Court had further held that the Eighth Amendment required individualized sentencing in capital cases. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987). Consistent with these holdings, the Court in *Miller* held that a statutory scheme mandating the imposition of life without parole on a juvenile offender was unconstitutional. As it did in *Graham*, the Court in *Miller* relied on its previous holdings in these capital cases to support its decision. *See Miller*, 132 S. Ct. at 2459 ("By likening life-without-parole sentences for juveniles to the death penalty, *Graham* makes relevant this Court's cases demanding individualized sentencing in capital cases.").

The logical progression of these holdings does not in any way lead to or support the circuit court's unwarranted expansion of the cruel-and-unusual-punishment clause to invalidate any statute that imposes on a juvenile offender any mandatory minimum sentence or period of incarceration for any offense. The vast difference between life imprisonment without parole and

three years before being eligible for release exposes the unsoundness of the circuit court's judgment.

E. The circuit court erroneously concluded that the ACA statute violates Missouri's Constitution.

The circuit court held that the ACA statute's three-year-mandatory prison sentence did not permit the court to consider a juvenile offender's youth and background in fashioning a sentence since the statute did not allow the court to suspend the prison sentence. This analysis is plainly incorrect. The court can consider these factors in determining a juvenile offender's sentence for ACA, which provides for a range of punishment from three years to an unlimited number of years or life imprisonment. Simply because the legislature mandates a minimum sentence of three years to be served in prison does not preclude a court from considering a juvenile's mitigating circumstances in choosing a sentence within that range.

The circuit court also found that a statute that requires a juvenile offender to be sentenced to prison for any amount of time has no penological justification and is unconstitutional. (L.F. 110–11). But the court supported this proposition by pitting the judgment of the court against that of the duly elected General Assembly. The circuit court determined that any statute that limits the discretion of a court to impose a suspended sentence is

automatically unconstitutional. (L.F. 110). But this Court has held that "[s]ubstantial deference is due to the legislature's determination of proper punishment." *State v. Pribble*, 285 S.W.3d 310, 314 (Mo. banc 2009) (rejecting the defendant's Eighth Amendment challenge to a statutorily mandated sentence of five years' imprisonment without parole upon his conviction for enticement of a child). Moreover, this "Court will not question the General Assembly's determination [of punishment] beyond this narrow [proportionality] inquiry, as matching prison terms with particular crimes is, as a general matter, the legislature's province." *Id.* Determining the punishment for a crime "is a legislative and not a judicial function." *Hart*, 404 S.W.3d at 246 (quoting *State v. McGee*, 361 Mo. 309, 234 S.W.2d 587, 590 (en banc 1950)). *See also Evans*, 45 S.W.3d at 459 (holding that the ACA statute "indicates the legislature's intent to impose greater punishment on those individuals who choose to use an item or weapon to commit a crime than those who do not").

To support its interpretation of Missouri's cruel-and-unusual-punishment clause to preclude the imposition of any statutorily required term of incarceration on a juvenile, the circuit court relied on a statement contained in *Miller* in which the Court observed that the traits in children that distinguish them from adults are not "crime specific": "The United States

Supreme Court has specifically held that 'none of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific.'" (L.F. 99). The circuit court read too much into this out-of-context statement. In context, this passage reads:

> *Graham's* flat ban on life without parole applied only to nonhomicide crimes, and the [c]ourt took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham's* reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Miller, 132 S. Ct. at 2465.

The Connecticut Supreme Court has flatly rejected the argument that this passage, when viewed in context, supported a constitutional mandate giving judges unlimited discretion in sentencing juvenile offenders and precluding imposition of statutorily mandated minimum sentences:

> From this more complete rendition of the passage, it is clear that the [C]ourt in *Miller* was referring only to the fact that *Graham's* reasoning regarding a sentence of life without the possibility of parole applied equally to both homicide and nonhomicide offenses committed by juvenile offenders. There is nothing in the passage suggesting that the court was also referring to less severe punishments or that trial courts should have unfettered discretion in sentencing juvenile offenders.

State v. Taylor G., 110 A.3d 338, 349 n.8. (Conn. 2015).

The circuit court also found a "statewide consensus" against mandatory incarceration for juvenile offenders by looking at various state statutes relating to juvenile-justice matters. (L.F. 112–23). But if this survey truly represented a statewide consensus, it raises the question why hasn't the General Assembly enacted legislation preventing the imposition on juvenile offenders of any mandatory minimum sentences providing for incarceration. In fact, in 2013, the General Assembly reenacted section 211.071, RSMo Cum. Supp. 2013, which requires a juvenile-certification hearing if the alleged offenses involve first-degree rape or sodomy, and both of these offenses carry mandatory minimum sentences requiring incarceration if certain circumstances are found and prevent the imposition of suspended sentences. *See* §§ 566.030, and 566.060, RSMo Cum. Supp. 2013. Simply

because the circuit court is frustrated with the General Assembly's legislative priorities does not give it authority to wield the sword of judicial review to strike down statutes that do not reflect the circuit court's policy preferences.

The circuit court's application of the severance doctrine to strike the ACA statute's mandatory-incarceration provision was also unauthorized by law. To apply the severance doctrine in this manner required the court "to overstep its constitutional boundaries." *Hart*, 404 S.W.3d at 245. "Severance does not authorize—and cannot justify—an intrusion by this Court into the legislative prerogative to determine what is (and is not) a crime under Missouri law and to authorize which punishments will be (and will not be) applicable to these crimes." *Id.* (rejecting an invitation to apply the severance doctrine so that the without-probation-or-parole language in the penalty provision of the first-degree murder statute would not apply to juvenile offenders). Although no one would dispute a court's authority to step in when a statute clearly and undoubtedly violates the constitution, it is abundantly clear that no such violation occurred in this case. Requiring a juvenile, who committed first-degree assault by stabbing someone in the back with a knife, to spend three years in prison does not clearly offend the cruel-and-unusual-punishment clause of the Missouri Constitution. The circuit court's unwarranted use of its

power to declare a statute unconstitutional in this case involved the mere substitution of its own policy judgment for that of the legislature.

The circuit court's reliance on the Iowa Supreme Court's decision in *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014), to find that any statutorily mandated term of incarceration imposed on a juvenile constitutes cruel and unusual punishment is also unavailing. The court in *Lyle* held that "a statute mandating a sentence of incarceration in a prison for juvenile offenders with no opportunity for parole until a minimum period of time has been served" violated the Iowa Constitution's cruel-and-unusual-punishment clause. *Id.* at 380. But in reaching this holding, the Iowa court relied on peculiar aspects of Iowa law. First, the Iowa court's interpretation of its state's constitution was influenced "in part on the state legislature's decision in 2013 to expand the discretion of state courts in juvenile matters by amending Iowa's sentencing statutes to remove mandatory sentencing for juveniles in most cases." *Taylor G.*, 110 A.3d at 349 n.8 (criticizing the dissent's reliance on *Lyle* to prove that any statutorily mandated minimum sentence imposed on a juvenile was unconstitutional). Second, "other provisions in the Iowa criminal statutes vest[ ] considerable discretion in courts when deciding juvenile matters." *Id.* Third, the court in *Lyle* relied "on a trilogy of recent juvenile cases decided by

the court under the Iowa constitution."[10] *Id.* Finally, "the Iowa court recognized that 'no other court in the nation has held that its constitution or the [f]ederal [c]onstitution prohibits a statutory scheme that prescribes a mandatory minimum sentence for a juvenile offender' and that 'no…national consensus exists against the imposition of mandatory sentences on juvenile offenders; the practice is common across jurisdictions.'" *Id.* (quoting *Lyle*, 854 N.W.2d at 386, 387) (alteration in original).

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[10] *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) (finding unconstitutional a sentence with parole after 60 years since it was the "functional equivalent" of a life-without-parole sentence); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (finding unconstitutional aggregate sentences for multiple offenses totaling 52.5 years since it did not "provide a "meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*"); *State v. Pearson*, 836 N.W.2d 88, 95–97 (Iowa 2013) (finding unconstitutional a total sentence of 35 years since it "effectively deprived" the juvenile defendant "of any chance of an earlier release and the possibility of leading a more normal adult life").

F. The circuit court's judgment is inconsistent with decisions by Missouri appellate courts and those in other jurisdictions.

Missouri courts that have considered similar Eighth Amendment issues have uniformly rejected invitations to expand the reach of the Eighth Amendment to circumstances clearly not encompassed by the holdings in *Roper*, *Graham*, and *Miller*.

In *Burnett v. State*, 311 S.W.3d 810 (Mo. App. E.D. 2009), the court held that the imposition of a 60-year sentence for child kidnapping, first-degree assault, forcible sodomy, and attempted forcible rape on a 15-year-old offender did not violate the Eight Amendment. *Id.* at 814–16. In reaching this holding, the court "decline[d] to extend the reasoning of *Roper*" to the sentence imposed in that case. In *State v. Denzmore*, 436 S.W.3d 635 (Mo. App. E.D. 2014), the court rejected an Eighth Amendment challenge to the imposition of a 44-year sentence on a 17-year-old who had committed multiple nonhomicide offenses, including robbery and kidnapping. *Id.* at 644–45.

Courts in other jurisdictions have rejected Eighth Amendment challenges for sentencing schemes that required the imposition of a mandatory minimum prison sentence on a juvenile offender.

In *Taylor G.*, the juvenile defendant was sentenced to statutorily mandated minimum terms of incarceration of 10 years and 5 years (to run concurrently) for sex crimes he committed when he was 14 and 15 years old. 110 A.3d at 341–43. The defendant argued that this sentencing scheme violated the Eighth Amendment because it did not provide for an "individualized, proportionate sentence" in that it prevented the sentencing court from considering "relevant mitigating evidence of the offender's youth and immaturity." *Id.* at 343.

The Connecticut Supreme Court rejected this challenge because the defendant's sentence was "far less severe than the sentences at issue in *Roper*, *Graham* and *Miller*," and "because the mandatory minimum requirements, while limiting the trial court's discretion to some degree, still left the court with broad discretion to fashion an appropriate sentence that accounted for the defendant's youth and immaturity when he committed the crimes." *Id.* at 345–46. The court observed that the defendant's ten- and five-year minimum sentences were "qualitative[ly] different" than the life-without-parole sentences at issue in *Graham* and *Miller*, which is the harshest sentence that may be imposed on a juvenile offender. *Id.* at 346. It held that "[a]lthough the deprivation of liberty for any amount of time, including a single year, is not insignificant, *Roper*, *Graham* and *Miller* cannot

be read to mean that all mandatory deprivations of liberty are of potentially constitutional magnitude." *Id.*

The court also refused to find that the Eighth Amendment was "automatically" violated because the trial court was prevented from being able to "fully" exercise its discretion to give a lesser sentence in the defendant's case:

> All mandatory minimum sentences limit, to some extent, the discretion of courts to craft a sentence that accounts for the special characteristics of the offender and the offense. Even mandatory minimum sentences of one or two years limit the discretion of courts by precluding the imposition of lesser sentences on offenders regarded as deserving of a lesser penalty because of compelling mitigating factors. …The limitations that mandatory minimum sentences place on a trial court's discretion, however, do not automatically constitute an [E]ighth [A]mendment violation.

Id. at 347. Finally, the court observed that in *Graham* "the [C]ourt made clear that juveniles convicted of nonhomicide crimes…are not immune from very harsh punishments, including life in prison, merely because of their youth when they committed the crimes." *Id.* at 348.

In *Commonwealth v. Lawrence*, 99 A.3d 116 (Pa. Super. Ct. 2014), a juvenile defendant convicted of first-degree murder was given a statutorily mandated minimum sentence of 35 years' imprisonment. *Id.* at 118–19. The defendant argued that this sentencing scheme violated the Eighth Amendment because it did not allow for consideration of the individualized sentencing factors outlined in *Miller v. Alabama*. *Id.* at 119. Although the court noted that the statute "divested" the trial court of "any discretion to impose a lesser minimum sentence," it refused to extend *Miller* "beyond the mandatory sentencing schemes that it considered." *Id.* at 121. The court also refused to find that the Eighth Amendment either prohibited any sentencing scheme requiring a mandatory minimum term of imprisonment for a juvenile offender or that it required "open-ended minimum sentencing":

> We do not read *Miller* to mean that the Eighth Amendment categorically prohibits a state from imposing a mandatory minimum imprisonment sentence upon a juvenile convicted of a crime as serious as first-degree murder. [The defendant]'s argument against a mandatory minimum of 35 years presents the same concerns as would a mandatory minimum of 35 days' imprisonment. Stated another way, [the defendant]'s position implicitly requires us to conclude that open-

ended minimum sentencing is constitutionally required by the Cruel and Unusual Punishment Clause. We decline to announce such a rule.

Id. at 121 (footnote omitted).

In *People v. Pacheco*, 991 N.E.2d 896 (Ill. App. 2013), a 15-year-old who was prosecuted on a murder charge in adult court under an automatic-transfer statute, argued that "the automatic imposition of any adult sentence on a juvenile offender" violated the Eighth Amendment. *Id.* at 907. The Court rejected this argument and held that the defendant had read "*Roper*, *Graham*, and *Miller* too broadly" since those cases dealt with life-without-parole sentences, the harshest sentence that can be imposed on a juvenile. *Id.* The court also noted that "when taken to its logical extreme, [the] defendant's argument would make any statute unconstitutional which imposes on a juvenile transferred to adult court the same mandatory minimum sentence applicable to an adult for the same offense." *Id.* Finally, the court observed that it cannot declare a statute unconstitutional simply because it disagrees with the policy choice made by the legislature:

> However, we cannot find a statute unconstitutional simply because we believe it creates bad policy. "In relation to the judicial branch, the General Assembly, which speaks through the passage of legislation, occupies a superior position in determining public policy."

Id. at 908 (quoting *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1057 (Ill. 1999)).

Other courts have similarly held that the Eighth Amendment does not bar statutorily mandated minimum prison sentences for juvenile offenders. *See Ouk v. State*, 857 N.W.2d 698 (Minn. 2014) (15-year-old convicted of first-degree murder given statutorily mandated sentence of life imprisonment with the possibility of release after 30 years); *Commonwealth v. Okoro*, 26 N.E.2d 1092, (Mass. 2015) (15-year-old convicted of second degree murder and given statutorily mandated sentence of life imprisonment with parole eligibility after 15 years). *See also United States v. Reingold*, 731 F.3d 204, 215 (2nd Cir. 2013) (noting in dicta that it was not persuaded that a there was a "consensus against five-year prison terms for juveniles convicted of child pornography crimes").

G. The penalty provision of the ACA statute does not violate any principle of proportionality.

Although the circuit court did not rule that the ACA statute violated any proportionality principle embodied in the Missouri Constitution, a brief analysis shows that no such violation occurred.

"Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and

proportioned to [the] offense.'" *Graham v. Florida*, 560 U.S. at 59 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Proportionality "'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" *Id.* at 60 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

This Court has recognized *Harmelin* as providing the appropriate analysis for cruel-and-unusual-punishment challenges to a statute. *See Pribble*, 285 S.W.3d at 314. *Harmelin* "clarified that reviewing courts are to determine, as a threshold matter, whether a sentence is 'grossly disproportionate.'" *Id.* at 314. "In making this determination," this Court considers "the gravity of the offense and the harshness of the penalty." *Id.* "If a sentence is not grossly disproportionate, then additional comparisons to sentences given to other defendants for the same or similar crimes are irrelevant." *Id.* "Gross disproportionality will be found only in 'exceedingly rare' and 'extreme' cases." *Denzmore*, 436 S.W.3d at 644 (citing *Burnett*, 311 S.W.3d at 814). In making this analysis, "[s]ubstantial deference is due to the legislature's determination of proper punishment." *Pribble*, 285 S.W.3d at 314.

A statutorily mandated minimum sentence of three years' imprisonment under the ACA statute for committing a violent felony by using a knife to

stab the victim in the back does not begin to violate the proportionality principle that may be found in Missouri's cruel-and-unusual-punishment clause. In *Harmelin*, for example, the Court upheld a statutorily mandated term of life imprisonment without parole for a recidivist defendant convicted of possessing 672 grams of cocaine. *See Harmelin*, 501 U.S. at 994–95, 1002–09. The Court further held that this mandatory sentencing scheme, rather than an individualized determination of punishment, was not "cruel and unusual" under the Eighth Amendment. *Id.* at 995–96, 1006–08 ("There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory."). *See also Ewing v. California*, 538 U.S. 11 (2003) (rejecting a proportionality challenge to a prison sentence of 25 years to life imposed under California's Three Strikes Law on a recidivist felon convicted of stealing golf clubs); *Reingold*, 731 F.3d 218–19 (holding that a congressionally mandated sentence of five years' imprisonment for a child-pornography offense did not violate the Eighth Amendment).

CONCLUSION

The circuit court erred in declaring the penalty provision of the ACA statute (section 571.015) unconstitutional. This Court should reverse the circuit court's judgment.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,436 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2010 software; and that a copy of this brief was sent through the electronic filing system on July 15, 2015, to:

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